In the absence of a direct authority on this point and with the greatest respect to Gill, F.J. (as he then was), I agree with the submission of the Plaintiff's Counsel and Dr. David Wong that section 26 of the Specific Relief Ordinance 1950 has no application to the Torrens System. In the circumstances, the Defendant's Counterclaim is dismissed with costs.

I give judgment for the Plaintiff in the terms of his prayer in his Statement of Claim except prayer (ii).

Claim allowed.

Solicitors: *Skrine & Co.: Sri Ram & Co.*

SILIMUTHU v. AMALU & ANOR.

[O.C.J. (Yusof Abdul Rashid J.) November 30, 1981]
[Johore Bahru – Civil Suit No. 84 of 1981]

Contract – Sale agreement relating to land by beneficiaries of intestate estate – Letters of Administration not yet obtained – Whether Agreement was enforceable against beneficiaries

Probate & Administration – Intestate estate – Sale agreement entered into by beneficiaries of – Whether said agreement enforceable

One Krishnan died intestate leaving behind the defendants as beneficiaries. On July 20, 1980, the defendants entered into a sale agreement with the plaintiff in relation to a piece of land which formed part of the intestate estate. The said sale agreement was subject to the defendants applying for Letters of Administration and leave of the court to effect the transfer of the said land. In the event that the defendants were unable to take out the Letters of Administration or that should they fail to obtain the requisite leave from the court, they were to return the sum of $4,250 which had been paid by the plaintiff to them. A further sum of $2,750 was due to the defendants on the execution of the transfer of the said land.

The defendants failed to apply for Letters of Administration notwithstanding the plaintiff's request for them to do so. The plaintiff took out an action in court for an order to compel the defendants to do so.

Held; (1) this was a case where the right of the plaintiff rests in contract and a case based on the defendants' contractual obligations founded on a promise to do an act;

(2) the agreement entered into by the defendants with the plaintiff on July 20, 1980 was valid and the plaintiff was entitled on the court order requiring the defendants to apply for permission of the court to sell the said land to the plaintiff in accordance with the said agreement;

(3) accordingly the defendants were ordered to apply for Letters of Administration within one month of the date for judgment and within one month of the grant of Letters of Administration, duly extracted, the defendants were required to apply for leave of the court to have the said land transferred to the plaintiff.

Cases referred to:

(1) *Tan Swee Lan* v. *Engku Nik binti Engku Muda & Ors.* [1973] 2 M.L.J. 187.
(2) *Halijah* v. *Morad & Ors.* [1972] 2 M.L.J. 166.
(3) *Kersah La'usin* v. *Sikin Menan* [1966] 2 M.L.J. 20, 22.
(4) *Haji Osman bin Abu Bakar* v. *Saiyed Noor bin Saiyed Mohamed* [1952] M.L.J. 37.
(5) *Haji Saud* v. *Haji Ahmad & Anor.* [1957] M.L.J. 50
(6) *Smallman* v. *Smallman* [1971] 3 All E.R. 717.
(7) *Woo Yew Chee* v. *Yong Yong Hoo* [1979] 1 M.L.J. 131.

CIVIL SUIT.

C. Sukumaran for the plaintiff.
S. Bala for the defendants.

Cur. Adv. Vult.

Yusof Abdul Rashid J.: One Krishnan s/o Pachar died intestate leaving behind and surviving the defendants, who were the widow and son of the deceased, and some other minor children as beneficiaries who were entitled to the intestate estate. A piece of land held under E. Lease 122, Lot 2134 in the Mukim of Rengam Kluang forms part of the intestate estate. On July 20, 1980, the defendants entered into a sale agreement with the plaintiff in relation to the said land subject to the defendants applying for Letters of Administration and leave of the Court to effect the transfer of the said land. In the event that the defendants were unable to take out the Letters of Administration or that should they fail to obtain the requisite leave from the court, they were to return the sum of $4,250/- which had been paid by the plaintiff to them. A further sum of $2,750/- was due to the defendants on the execution of the transfer of the said land.

On the failure of the defendants, having been requested to do so on several occasions, to apply for Letters of Administration, the plaintiff took out an action in court for an order to compel the defendants to do so. In effect, the plaintiff demanded that the defendants should discharge their obligations under the contract of sale. It is to be noted that the plaintiff did not apply for an order that the defendants shall execute a transfer before first obtaining the Letters of Administration and the requisite leave of the court to sell. In my view this is a case where the right of the plaintiff rests in contract and a case based on defendants' contrac-

tual obligations founded on a promise to do an act. The only issues before me were that first, was there a promise which is enforceable in law for the defendants to apply for Letters of Administration in respect of the estate of the deceased Krishnan s/o Pachar and secondly, did the defendants enter into contract, undertaking to apply for leave of the court, having been duly granted Letters of Administration, to effect the transfer of the said land.

When the agreement was executed on July 20, 1980 the parties were fully aware that the defendants were bare beneficiaries of the estate of the deceased Krishnan s/o Pachar and that the defendants had yet to be granted Letters of Administration. They were conscious that Letters of Administration had to be obtained and on being so granted there was a further need to obtain permission of the court to effect the sale. Since the terms of the agreement were concisely expressed, it is convenient to state in full Clauses 1 - 4 of the said agreement:

"1. In consideration of a sum of Ringgit Four Thousand Two Hundred and Fifty ($4,250.00) only paid by the Second Party [the plaintiff] to the First Party [the defendants] (which sum the First Party hereby acknowledges) the First Party agrees to sell and the Second Party agrees to purchase the said land upon the terms and conditions set out hereto.

2. The First Party shall make the necessary Application for the Letters of Administration of the estate of the said deceased [Krishnan s/o Pachar] and also whatever necessary application that may be deemed fit and necessary to transfer the said land to the Second Party.

3. Upon the First Party hereof having complied as per Clause 2 of this Agreement, the First Party shall execute the instrument of transfer in favour of the Second Party, and upon which the Second Party also pay the balance sum of $2,750.00 to the First Party.

4. In the event the First Party is unable to obtain the Letters of Administration and the necessary Order of the Court to sell the said land to the Second Party the First Party shall refund the sum of $4,250.00 to the Second Party."

It is clear that the defendants had entered into an agreement to sell the said land subject to their obtaining Letters of Administration and the leave of the court to sell. However, the plaintiff was not seeking to enforce their primary rights under the agreement to require the defendants to transfer the said land to him. Instead the plaintiff required the defendants to discharge their obligations under Clause 2 thereof, that is to say, to apply for Letters of Administration and thereafter to apply for leave of the court to sell the said land to the plaintiff. In their defence the defendants averred –

"2. The 1st and 2nd named Defendants admit having entered into an Agreement with the Plaintiff for the sale and purchase of land known as E.Lease 122, Lot 2134, Mukim Rengam, District of Kluang *but contend that the said Agreement was legally invalid as the 1st and 2nd named Defendants were under legal incapacity* and they had no legal right or interest at the said time to alienate or dispose the said land to the Plaintiff. The said property was part of the deceased estate known as Krishnan s/o Pachar." [Emphasis added]

It is plain that the defendants relied on their position as bare beneficiaries when they entered into the said agreement to avoid their obligations Had the plaintiff applied for specific performance for the transfer of the said land to him I would have to consider whether or not the agreement was binding on the estate. Such deliberation, under the circumstances, may be deferred since it is not an issue in the instant action. I need only consider the question whether the defendants were legally bound to discharge their obligations under the agreement to apply for Letters of Administration and thereafter to apply for permission of the court to sell the said land to the plaintiff. To my mind, I have no doubt at all that the defendants were legally competent to enter into agreement in the terms as stated above. I do not agree that the agreement was void *ab initio*. There is no proposition of law, to my knowledge, which prohibits beneficiaries of an estate of a deceased person from entering into an agreement of this nature. Instead there are authorities which point to the fact that beneficiaries are competent to enter into such agreement even before Letters of Administration has been granted to them. In *Tan Swee Lan* v. *Ungku Nik bte Ungku Muda & Ors.*[1] which is a Federal Court case, all the beneficiaries of the estate entered into a written agreement, agreeing to sell a piece of land which was a part of the estate of the late Ungku Muda bin Ungku Besar. The High Court refused to allow specific performance on the ground that the claim was statute-barred. The Federal Court allowed the appeal and specific performance was granted. In another Federal Court case of *Halijah* v. *Morad & Ors.*[2], four beneficiaries entered into an agreement to transfer a piece of land to the appellant, two of the four were then minors. The Federal Court agreed with the trial judge that as regards the two beneficiaries who had attained the age of majority the agreement was binding on them but since the action was taken well after the statutory period allowed under the law, the claim for the transfer was statute-barred. Though the

Federal Court in the above cases did not deliberate on the incapacity or otherwise of the beneficiaries to enter into such contract, there is no doubt that if the Federal Court were of the view that the contract was void *ab initio*, it would have said so notwithstanding that such view was never canvassed by the respective parties.

As stated earlier the defendants raised a defence that

"they had no legal right or interest at the said time to alienate or dispose the said land"

and they cannot possibly be in a position, legally, to enter into contract with the plaintiff purporting to sell the said land. In answer to this, I need only cite part of the speech of His Lordship Raja Azlan Shah, J. [as he then was] in the case of *Kersah La'usin* v. *Sikin Menan*[3]

"... The fact that at the date of contract the vendor had neither title nor power to call for title is not of itself an answer to a suit of specific performance by the purchaser: BICKLES v. SNELL [1916] 2 AC 599. Actual possession of both the legal estate and any equitable rights are not prerequisites so long as the vendor is in such a position that when the time for completion comes he will be in a position to pass on the title to the purchaser. In those circumstances the contract is good but only in equity.".

In the instant case, had the defendants purported to transfer absolutely the said land without subjecting such transfer to any other condition, it might well be void. But the issue in this case is whether there is a cause of action for the defendants to be ordered to apply for Letters of Administration as promised by them. To my mind, there is such cause of action and since a year had lapsed without the defendants applying for Letters of Administration, the defendants may be ordered to do so by the court. The agreement may be void and become unenforceable if the defendants, having been granted Letters of Administration, failed to obtain the requisite permission of the court to have the said land transferred to the plaintiff. Until the defendants have applied and a decision made by the court, it cannot be said that the act which the defendants contracted to do, has become unlawful. The circumstances of the instant case might well be similar to that considered by the Court of Appeal, the predecessor of the Federal Court, in *Haji Osman bin Abu Bakar* v. *Saiyed Noor bin Saiyed Mohamed*[4] and *Haji Saud* v. *Haji Ahmad & Anor.*[5]. However, to decide on this case, I need not apply my mind to this issue.

As an analogy, the counsel for the plaintiff drew my attention to the English Court of Appeal case of *Smallman* v. *Smallman*[6] wherein the said court was required to decide on the validity of an agreement which was reached "subject to the approval of the court." Lord Denning, M.R. in his speech said –

"In my opinion, if the parties have reached an agreement on all essential matters, then the clause 'subject to the approval of the court' does not mean there is no agreement at all. There is an agreement, but the operation of it is suspended until the court approves it. It is the duty of one party or the other to bring the agreement before the court for approval. If the court approves, it is binding on the parties. If the court does not approve, it is not binding. But, pending the application to the court, it remains a binding agreement which neither party can disavow."

To my mind the said analogy is indeed a useful aid to me in coming to my conclusion in this instant case.

In passing, assuming that it was wrong for the defendants to bind themselves in such a manner as in the instant case (which in my opinion it was not), in the interest of public policy, it is pertinent to ask the question whether the court would allow the defendants to take advantage of their own wrong. The defendants were fully aware that when they entered into agreement they were bare beneficiaries and were in no position, without first obtaining Letters of Administration and leave of the court, to dispose of the said land to the plaintiff. His Lordship, Raja Azlan Shah, Acting C.J. (Malaya) [as he then was] in delivering the judgment of the Federal Court case of *Woo Yew Chee* v. *Yong Yong Hoo*[7] said at page 133 –

"... It is a universal principle of law that the court would not allow a party to take advantage of his own wrong (See *Rede* v. *Fair* 105 ER 1188, 1189)"

In my judgment the agreement entered into by the defendants with the plaintiff on July 20, 1980 was valid and the plaintiff was entitled to the court order requiring the defendants to apply for Letters of Administration and subsequently to apply for permission of the court to sell the said land to the plaintiff in accordance with the said agreement. Accordingly the defendants were ordered to apply for Letters of Administration within one month of the date of judgment and within one month of the grant of Letters of Administration, duly extracted, the defendants were required to apply for leave of the court to have the said land transferred to the plaintiff.

Order accordingly.

Solicitors: *S.I. Rajah & Co.; Bala & Co.*